No. 92-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

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In its Opposition, the Airport: (1) confuses and mischaracterizes the important questions raised by this case; (2) incorrectly suggests that the case is "fact intensive"; (3) erroneously contends that the case presents no conflict in the Circuits and no departure from this Court's precedents; and (4) ignores the undisputed, widespread importance of the questions presented. None of these efforts to avoid review by this Court is sound.

1. THE ACTUAL QUESTIONS PRESENTED

This case raises two straightforward questions: whether the Airport's fee methodology is "reasonable" under the AHTA; and whether the courts are precluded from reviewing the methodology under the Commerce Clause simply because Congress took some action to regulate airport fees. These were the questions presented and decided below and that the Airlines now ask this Court to review. The Airport, however, attempts to transform the case into something it is not, by claiming (a) that the Airlines wish to be made "partners" with the Airport through a "cross-crediting" of concession revenues, and (b) that the Court would have to engage in complex issues of cost-accounting in order to resolve the dispute. *See* Brief of All Respondents in Opposition to Petition for Writ of Certiorari ("Opp.") at 1, 6, 9, 10. Both these claims are spurious.

The Airlines have never argued that the AHTA regulates concession revenues, that the Airlines are entitled to "share" in those revenues, or that the courts must "impose" a single accounting system on this or any other airport. The Airlines contend only that the fees imposed on *them* are unreasonable under the AHTA, and that concession operations must be *considered* when deciding that issue. Specifically, the Airlines have contended that Airline fees which assign all costs of airside activities to the Airlines and none to concessions are necessarily unreasonable (as Judge Flaum held in *Indianapolis*); that total fees on Airlines and their passengers (including concession fees) that are out of all proportion to Air-

port costs are necessarily unreasonable (as Judge Posner held in *Indianapolis*); and that, even if concession operations must be totally ignored under the AHTA—which Congress clearly did not intend[1]—those concessions are necessarily part of interstate commerce and must therefore be included in testing the reasonableness of total Airport charges under the Commerce Clause. Contrary to the Airport's assertion (Opp. 1 n.1), the Airlines have been completely consistent on all these issues.

Nor would resolution of these issues entangle the Court in complex accounting or rate-setting matters, any more than it did the lower courts. *See* Opp. 10. The Court is simply being asked to decide whether the Airport's fee methodology is reasonable under the clear standards already set forth in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972). Thus, as Judge Posner noted in *Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), there is no "single valid method" of calculating fees, and no cause for this Court to "tell [the Airport] what fees it must charge." *Id.* at 1270. Rather, the Court is being asked only to "invalidate an unreasonable rate," not to "fix the reasonable rate." *Id.* This is plainly an appropriate judicial function; so too is deciding whether the Airport's fee methodology violates the Commerce Clause, an issue the Sixth Circuit refused to decide. *These* are the questions presented by this case, and nothing in the Airport's Opposition should be allowed to obscure them.

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[1] That Congress intended concession operations to be taken into account is demonstrated by its enactment of 49 U.S.C. § 2210, which the Airport agrees "*must* be considered in applying AHTA." Opp. 18 (emphasis supplied). That statute requires that airports "be available for public use on fair and reasonable terms and without unjust discrimination" and charge total fees "which will make the airport as self-sustaining as possible." 49 U.S.C. § 2210(a)(1), (9). The legislative history to the AHTA furthermore makes clear that Congress intended thereby to preclude Airports from earning "financial windfalls" on top of the substantial subsidies already being provided by the federal government. *See* S. Rep. No. 93-12, *reprinted in* 1973 USCCAN 1434, 1446.

2. THE SIMPLE, UNDISPUTED FACTS UNDERLYING THE QUESTIONS

Contrary to the Airport's assertions, this is not a "fact-intensive rate case" that is "heavily dependent on the fact findings of the District Court." Opp. 6, 2. The few material facts are simple and undisputed: (1) the Airport assesses fees earning surpluses far in excess of its needs to remain self-sustaining (*see* App. 9a, 30a); (2) the Airport allocates to the concessions none of the costs of "airside" operations, but charges nearly all those costs to the Airlines (*see* App. 27a); and (3) the Airport charges the Airlines 100% of their allocated costs, while charging local aviation only 20% of their allocated costs. (*See* App. 12a). The question is whether on these undisputed facts the Airport's methodology is "reasonable"—as a matter of law—under both the AHTA and the Commerce Clause.

The Airport, however, has attempted to manufacture other dispositive "factual" issues. For example, the Airport contends that this case turns on the "factual" finding that the Airlines are being charged only the Airport's "break-even" costs. Opp. 3 (quoting App. 37a). This contention seriously misconstrues the record. It is *undisputed* that the Airport's fee methodology generates huge surpluses (a fact which "troubled" the District Court (App. 39a)) at the expense of the Airlines and their passengers.[2] The District Court's statement that the Airlines were being charged only their "break-even" costs is its ultimate *legal* conclusion, not a factual finding; for the statement rests on the court's legal determinations that the large surpluses derived from fees imposed on the concessions and their customers, and the failure to assess the concessions any of the "airside" costs from which they benefit, are irrelevant under both the AHTA and

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[2] As the District Court expressly found, these surpluses are accumulating at a rate in excess of $2,000,000 per year; they had risen to $9,000,000 by the end of 1989; and at that time the Airport's outstanding debt was less than $2,000,000, most of which will be retired by 1994. *See* App. 30a.

the Commerce Clause. It is those *legal* determinations that are presented here for review.[3]

3. THE CONFLICT OVER THE QUESTIONS, AND THE DEPARTURE FROM THIS COURT'S PRECEDENTS

The Airport attempts to distinguish this case from *Indianapolis* on two grounds, neither of which is valid. First, the Airport asserts that, unlike at the Indianapolis airport, the availability of other airports within an hour and a half from Grand Rapids allows passengers "some role in determining from which airport to travel." Opp. 14 (quoting lead opinion at App. 10a). However, this purported availability is as irrelevant here as it was in *Indianapolis*. Under the AHTA, fees must be reasonable irrespective of an airport's monopoly power; and while the presence or absence of passenger alternatives may affect an airport's *ability* to impose unreasonable fees on them, the fees must in any case be reasonable and the test of that reasonableness remains the same. Moreover, the fact that *passengers* may have other options has nothing to do with the unreasonableness of fees on the *Airlines*. Furthermore, in *Indianapolis* neither Judge Posner nor Judge Flaum held that a court must make a threshold finding of monopoly power before it can

[3] The Airport also claims there is no support for—but does not dispute—the unsurprising proposition that local aviation is primarily engaged in intrastate travel. *See* Opp. 25. However, as Judge Kennedy found (in dissent), the Airport discriminates "against the Airlines in favor of locally owned aircraft." App. 12a. Accordingly, she embraced the finding of the *Indianapolis* court that "since flights by private planes are more likely to be intrastate than airline flights," the discrimination "shift[s] some of the costs imposed by local users of the airport to its interstate users . . . ." App. 13a (quoting *Indianapolis*, 733 F.2d at 1271). Moreover, even if general aviation were not primarily intrastate (which it plainly is) and even if the Airlines were not primarily interstate (which they plainly are), it would still be undeniable that the Airlines are being discriminated against in favor of general aviation. And, as both Judge Kennedy found here and Judges Posner, Coffey, and Flaum found in *Indianapolis*, such discrimination renders the fees unreasonable as a matter of law.

scrutinize an airport's fees under the AHTA. Rather, those Judges simply applied the same standards the Airlines believe should be applied here and, upon doing so, found the Airport's fees unreasonable as a matter of law.

Second, the Airport incorrectly asserts that the *Indianapolis* court found that "'the people who use the concessions at the Indianapolis airport are, with rare exceptions airline passengers,'" while the same is not true in this case. Opp. 15-16 (quoting *Indianapolis*, 733 F.2d at 1267). This is simply incorrect. As the Airport expressly *conceded* in the court below, "most of the passengers at the Airport are Western Michigan origin or destination ("O and D") travelers, *who constitute the primary consumers generating the non-aeronautical (concession) revenue . . . .*"[4] Thus, as in *Indianapolis*, it is clear that the Airlines and their passengers are effectively charged total fees that are out of all proportion to the Airport's costs. It is also clear that even if Grand Rapids were not an airport where airline passengers in practice pay the concession fees, the fee methodology in this case would still be unlawful under *Indianapolis*: for it would still be true that the concessions at this Airport receive a substantial benefit from the airside activities that create their customer flow, but are allocated none of the costs of those activities; and it would also still be true that the Airlines are discriminated against in favor of local aviation. In short, there is no meaningful distinction between this case and *Indianapolis*; the inescapable fact is that the Sixth and Seventh Circuits are in irreconcilable conflict.

In the face of this, the Airport is reduced to arguing that *Indianapolis* is an "aberration which requires scant attention." Opp. 16. It is, of course, debatable which of the two conflicting Circuit Court decisions is "mainstream" and which the "aberration." In our view the Seventh Circuit—which followed this Court's definition

[4] Appellee Airport's Brief at 5, *Northwest Airlines, Inc.* v. *County of Kent, Michigan*, No. 90-2117 (6th Cir. 1991) (citing trial testimony) (emphasis supplied).

of reasonable fees in *Evansville*—is plainly the correct one. But for the purposes of certiorari, that is not the point. The point is that, unless the Court resolves the conflict, the dozens of airports and hundreds of thousands of passengers in the Sixth and Seventh Circuits will now be subject to a different federal standard under a statute where uniformity is important. Moreover, the same question that has divided the Sixth and Seventh Circuits will be faced by every airport in the country and, unless this Court disapproves the Sixth Circuit's approach, a majority of airports across the country will inevitably elect a methodology, as did Grand Rapids, that puts no limit on the vast surpluses they can reap from the traveling public. In these circumstances, the Airport is completely wrong to suggest that the Circuit conflict deserves "scant attention."

The Airport is also wrong to deny that the Sixth Circuit's decision conflicts with *Evansville*. Significantly, although the Airport concedes that the *Evansville* standards control the reasonableness question under both the AHTA and the Commerce Clause (Opp. 17, 26), it continues to ignore the three *Evansville* requirements. Thus, first, regarding the requirement that its fees be "based on some fair approximation of use" (405 U.S. at 716), the Airport argues that it is not required to make *any* approximation of the benefit concessions receive from the airside activities, but can charge the whole of those activities to the Airlines. This is so, the Airport argues, because in *Evansville* the Court purportedly "distinguished passengers as a class from those who use concessions." Opp. 25. Regardless whether this is an accurate characterization of *Evansville*, here the Airport has expressly *conceded* that the concession customers and the Airlines' passengers are in fact one and the same. *See supra* at 5 & n.4. Accordingly, because the Airport allocates *no* airside costs to the concessions, the fees imposed on the Airlines plainly do not represent a "fair approximation of use" and are therefore unreasonable. *See Indianapolis*, 733 F.2d at 1276 (Flaum, J., concurring).

Second, regarding the *Evansville* requirement that its fees not be "excessive in comparison with the governmental benefit conferred" (405 U.S. at 716-17), the Airport's sole response is that the District Court "found" that the Airlines were charged only "break-even" costs. Opp. 23, 25. As noted above, this is a *legal* conclusion, not a factual finding; furthermore, it ignores the huge surpluses earned by the Airport under its fee methodology. *See supra* at 3 & n.2. In light of these surpluses—which are plainly derived from the Airlines and their passengers—it is simply undeniable that the Airport's fees "do more than meet . . . past, as well as current, deficits." 405 U.S. at 720. *See also Indianapolis*, 733 F.2d at 1268.

Third, there is no justification for the Airport's deliberate and blatant discrimination against interstate airlines in favor of locally-based general aviation. Contrary to the Airport's assertions (Opp. 25), *Evansville* did not approve such discrimination; on the contrary, there this Court expressly noted that "both interstate and intrastate flights [were] subject to the same charges." 405 U.S. at 717. Here, however, as was held in *Indianapolis* and found by Judge Kennedy in her dissent in this case, the Airport's fee methodology intentionally charges the Airlines and local aviations vastly different rates, which "is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." App. 13a (Kennedy, J., dissenting) (quoting *Indianapolis*, 733 F.2d at 1271).

Finally, the Sixth Circuit's holding that the Commerce Clause is inapplicable to this case cannot be reconciled with either the decisions of this Court or those of other lower courts. On this issue, this Court has repeatedly held that state regulations must meet Commerce Clause scrutiny unless Congress has "expressly stated" otherwise[5] with an "unmistakably clear" intent.[6] The

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[5] *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982) (citations omitted).

[6] *South Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984).

Airport's only answer is that this principle has never been specifically held applicable to "*Airport rate cases.*" Opp. 21 (emphasis in original). This is surely not a serious contention.[7] There cannot be one Constitution for airports and another for everyone else.[8]

4. THE WIDESPREAD IMPORTANCE OF THE QUESTIONS

Regarding the nationwide importance of a uniform application of the AHTA and the Commerce Clause,[9] the Airport makes two points. First, it says we have "distorted" Chief Judge Merritt's views on this issue. Opp. 17. Specifically, the Airport points out that the Chief Judge dissented from *en banc* review only on the issue

[7] Indeed, the lone case relied on by the Airport, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), had absolutely nothing to do with airports.

[8] Nor is there any merit to the Airport's argument that Commerce Clause review is unnecessary because the *Evansville* test applies under the AHTA as well. *See* Opp. 26. Contrary to the Airport's assertions, the Airlines agree that the tests are the same. Accordingly, if the Sixth Circuit, as did the Seventh Circuit in *Indianapolis*, had correctly applied the AHTA to the *totality* of the Airport's fee methodology—including taking into account the operations of the concessions—a Commerce Clause analysis would have been unnecessary. However, precisely because the court refused to consider the effect of concession fees under the AHTA, it was obligated to consider their effect under the Commerce Clause, as the Constitution undeniably covers such charges. *See, e.g., Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

[9] Given the Airport's view that the Commerce Clause applies differently to airport rates than to other forms of state regulations, it has no answer to the Airlines' contention that the Sixth Circuit's view of the Commerce Clause threatens judicial abdication for numerous forms of state regulations. For under the Sixth Circuit's approach, so long as the Congress takes *any* action to regulate an area, that precludes application of the Commerce Clause to that area. As we showed in our petition (pp. 18-19), that is not the law in this Court, and its adoption by the Sixth Circuit threatens subversion of both the Constitution and congressional intent in a host of areas. That is grounds for certiorari in itself.

whether 100% of crash, fire, and rescue costs should be charged to the Airlines, even though those costs obviously benefit other Airport users.[10] This was the one issue the Airlines prevailed on before the Sixth Circuit panel (on a 2-1 vote), and it appears that on the merits Chief Judge Merritt would have voted against the Airlines on that issue as well. But that is not the reason his dissent is important. It is important because the *rationale* of his dissent is the same one supporting this petition, *i.e.*, the Sixth and Seventh Circuit are in conflict over the correct interpretation of the AHTA, that conflict concerns a matter where national uniformity is important, and the conflict will inevitably affect airports throughout the country. App. 62a-63a.

In our petition we provided specific factual information illustrating the correctness of Chief Judge Merritt's observations. Specifically, we showed the vast number of airports and passengers affected by the kind of fees at issue, the huge dollar consequences of those fees to airports, passengers, and airlines, the impact of those fees on air travel, and the threat that excessive fees pose to the viability of a number of air carriers. Pet. 19-23. The Airport's only answer is to assert that the fees at Grand Rapids constitute only a small portion of the Airlines' total revenues, and that those fees could not *alone* spell the difference between a given carrier surviving or failing. Opp. 26-28. This totally misses the point of the nationwide data presented in our petition.

Of course we do not contend that the disputed fees at Grand Rapids are enough standing alone to damage the airline industry or hamper travel nationwide; nor do we contend that such fees are the sole cause of the industry's current troubles. Rather, our contention is that if the Grand Rapids experience were to spread nationwide—and it has already been authorized for all airports throughout the Sixth Circuit—it would be of considerable harm to air travel in this country.

[10] We expressly noted in our petition that Chief Judge Merritt favored *en banc* only on this issue. Pet. 13 n.7.

Our further contention is that for airlines whose continued existence is precarious—and whose profit margins are only a few percentage points at best—persistent, unreasonable fees at numerous airports will indeed be of great consequence, if not spell the difference between surviving and failing.[11] And our final contention is that Congress cannot possibly have intended the standard for "reasonable" fees under the AHTA to mean one thing in one part of the country, and something else in another.

The fact is that Congress intended the country's airports to receive most of their support through federal subsidies (financed by federal taxes on airline tickets), to make up the rest through user fees sufficient to make them self-sustaining, and in no event to reap "financial windfalls" at the expense of the Airlines and the traveling public. Yet, that is what was approved in this case—in the face of this Court's precedents and the contrary ruling in the Seventh Circuit. The matter warrants this Court's review.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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[11] As we showed in our petition, airport fees constitute over 4.5% of the Airlines' operating costs, while their profit margins are 2-3% at best. Pet. at 21-22.